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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1618

L. C. COOK - - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

L. C. Cook - - - - - - - *Petitioner*

v.

United States of America - - *Respondent*

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OPINION BELOW

The opinion of the Court of Appeals (Appendix, hereinafter Ap., pp. 2a-18a) is reported at 512 F. 2d 637.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1975. A petition for rehearing was denied on May 22, 1975. The jurisdiction of this Court is invoked through 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

In the criminal trial of twenty-four defendants together, did the trial court err and deny the petitioner a fair opportunity to participate in the selection of the

jury by allowing the petitioner, whose interests were in conflict with the other twenty-three defendants, only one peremptory challenge; and is the discretion allowed district courts in allotting peremptory challenges in multiple-defendant trials too broad and unbridled to insure reasonable uniformity of criteria for the effective participation by the parties in the selection of juries for trials of federal criminal cases?

II

In affirming the district court's refusal to sever petitioner from the joint trial of twenty-four defendants and the consequential disregard of petitioner's rights to fair trial and effective voice at trial, did the Court of Appeals sanction departure from the acceptable course of judicial proceedings so far as to call for exercise of this Court's power of supervision?

STATUTES AND RULES INVOLVED

Title 18 United States Code, Section 371:

Conspiracy to commit offense or to defraud United States:

If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only,

the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 United States Code, Section 2312:
Transportation of stolen vehicles:

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

Title 18 United States Code, Section 2313:
Sale or receipt of stolen vehicles:

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 24.

Trial Jurors

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it

deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 14.

Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a serevance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT

The petitioner, L. C. Cook, was convicted by a jury in the United States District Court for the Western District of Kentucky, Bowling Green Division, upon the charge of conspiracy (18 U.S.C. § 371) to violate the provisions of the Dyer Act (18 U.S.C. §§ 2312 & 2313).

The judgment of the district court was entered upon receipt of the jury verdict after an eight-week trial beginning on April 2, 1973. The trial was upon the charges contained in Count I (the conspiracy count) of a twenty-five count indictment. The remaining counts, all charging substantive violations of the Dyer Act, were severed by the district court for trial later. Petitioner was named only in the conspiracy count of that indictment.

Twenty-seven persons were named as defendants in the conspiracy count of the indictment (and there were 13 named, unindicted co-conspirators). Twenty-four, including petitioner, of course, went to trial. Three defendants were found not guilty by the jury, one secured a judgment of acquittal, and nineteen were convicted (See Opinion of Court of Appeals, Appendix [Hereinafter, Ap.] pp. 2a-3a).

The petitioner was sentenced to serve two years in the penitentiary and pay a fine of $5,000.00 (Judgment, Ap., pp. 19a-20a).

Over six months prior to trial and on other occasions up to and including the first day of trial peti-

tioner moved for a severance, a separate trial, strenuously asserting conflicts of interest and circumstance with all other named defendants, pointing to the confusion of issues and economic burdens which would flow from the trial of all defendants jointly, and complaining that in such a multiple-defendant marathon he would be deprived of the fair number of peremptory challenges of prospective jurors which would automatically be his were he tried alone.

The motions were overruled.

At the time the district court overruled petitioner's original motion for a severance, it also ruled that "the defense" would be allowed twenty-four peremptory challenges; that is, each defendant was given one strike in the selection of the jury. The prosecution was allotted the six strikes decreed by Rule 24(b) of the Federal Rules of Criminal Procedure.

The petitioner promptly and continually objected to this limitation, re-asserting the conflicts between his defense and those of the other defendants. The objections were overruled.

The selection of the jury was begun on the morning of the first day of trial. It was completed at 6:55 p.m. on the third day; and the jury was "sworn in" on the morning of the fourth day (Trial Order, 1st week, pp. 1-6).

At one point during the *voir dire* by petitioner's trial counsel a dispute arose between counsel and no less than three prospective jurors relative to the question of whether the testimony of a witness shown to be a liar in one instance should be disregarded in full

(Transcript of Evidence [Hereinafter, Tr.] Vol. 2, pp. 309-313).

Throughout the *voir dire* by the several counsel for the twenty-four defendants, conflicts in requests for challenges for cause surfaced, and objections to questions put to the prospective jurors by various defense counsel were voiced by attorneys for other defendants (See Trial Order, 1st week, pp. 4-5). Requests for additional peremptory challenges as the period of *voir dire* ended were denied (*Id.*).

During the eight-week trial hundreds of witnesses were called to prove the charges in the indictment. The transcript of evidence constitute sixty-two volumes, and there are eight trial orders—one for each week—plus the multitude of pre-trial motions, orders and records of proceedings.

The transcript of the evidence and proceedings *for and against* this petitioner, while disjointed at trial, consume about one-half of one of those sixty-two volumes.

From the start, and throughout trial and appeal, petitioner has insisted that he was due a separate trial.

The Court of Appeals recognized that petitioner was shown to be, at most, on the periphery of the charged conspiracy, and termed his, "involvement . . . ," as, "less extensive . . ." (Ap., p. 14a). Still, because the trial court had exercised undefined "sound discretion," *stare decisis* required no justification for producing before the jury which tried and convicted L. C. Cook the testimony of hundreds of witnesses wholly irrelevant to the guilt of L. C. Cook.

ARGUMENT

I

EXERCISE OF THE SUPERVISORY AUTHORITY OF THIS COURT IS NEEDED TO ESTABLISH UNIFORM STANDARDS AND GUIDELINES FOR THE FAIR ALLOTMENT OF PEREMPTORY CHALLENGES IN MULTIPLE-DEFENDANT TRIALS.

A. The Right to Exercise a Reasonable Number of Peremptory Challenges is Important in Securing to an Accused a Fair Trial.

"The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: 'In criminal cases, or at least in capital ones, there is *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at all; which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. . . .'"

Lewis v. *United States,* 146 U. S. 370, 376, 36 L. Ed. 1011, 13 S. Ct. 136 (1892).

"The function of the challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions in voir dire and facilitates the exercise of challenges for cause by

> removing the fear of incurring a juror's hostility through examination and challenge for cause."
>
> *Swain* v. *Alabama,* 380 U. S. 202, 219-220, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965).

Every experienced trial attorney knows that the *voir dire* of the jury panel is of crucial importance. And every experienced trial attorney knows that many considerations come into play in rejecting prospective jurors other than those complaints which would constitute "cause."

Melvin Belli, in his work *Modern Trials* (Bobbs-Merril Co. 1954) Vol. I, Chapter VII, devotes a seventy-seven page chapter to "The Jury." Ben W. Palmer in his jury-selection chapter of *Courtroom Strategies* (Prentice Hall 1965), spends five pages discussing the peculiarities of women jurors. And Chapter 8 of Cone & Lawyer, *The Act of Persuasion in Litigation* (Dean-Hicks Co. 1966), is titled, "Psychological Factors in Jury Selection."

And, in Kuvin, *Trial Handbook* (Prentice Hall 1965) pp. 91-92, it is said,

> ". . . [T]here are many considerations, almost unanimously recommended that an attorney should not overlook. The economic status—the ethnic group or ancestry to which the person belongs—the fact that there does exist in almost all persons certain subconscious or unconscious prejudices—that persons of certain background and training react to certain situations and the manner of such reaction is of vital importance when considering prospective persons as jurors."

This Court, in the cases just cited and the authorities cited in those cases has consistently expressed its recognition of the importance of peremptory challenges:

> "'[T]here is nothing in the Constitution of the United States which requires Congress [or the States] grant peremptory challenges,' Stilson v. United States, 250 U. S. 583, 586, 63 L. Ed. 1154, 1156, 40 S. Ct. 28, nonetheless, *the challenge is, 'one of the most important of the rights secured to the accused,'* Pointer v. United States, 151 U. S. 396, 408, 38 L. Ed. 208, 214, 14 S. Ct. 410. *The denial or impairment of the right is reversible error without a showing of prejudice.*"
>
> *Swain* v. *Alabama, supra,* 380 U. S. at 219. (Emphasis added.)

B. Rule 24(b) of the Federal Rules of Criminal Procedure Establishes No Criteria to Secure Reasonably Uniform Fairness in Jury Selection in Multiple-Defendant Trials.

Rule 24(b) of the Federal Rules of Criminal Procedure (quoted in full *supra,* pp. 3-4) is hardly any rule at all relative to a trial of multiple defendants.

The Court below recognized this through its citation of Professor Wright (Ap., pp. 11a-12a):

> "'. . . The rules do not prescribe any particular method of exercising peremptory challenges and the practice varies widely from district to district regulated only by local rule or custom.' 2 Wright, Federal Pretice and Procedure: Criminal §387."

And the editors of A. L. R. feel similarly:

> ". . . Rule 24(b) is silent as to the manner in which peremptory challenges are to be exercised, and the result of this silence has been the formation of various informal rules of exercising them, which rules depend, apparently, largely on the taste of the individual judge involved." *Annot.:* "Number and Manner of Exercising Peremptory Challenges in Federal Criminal Trials Subsequent to Promulgation of Rule 24(b) Federal Rules of Criminal Procedure." 11 A.L.R. Fed. 713, 717.

No particular direction in the interpretation of this rule appears from the various rulings of the district and appellate courts.

For example, a district court in Minnesota allowed seven defendants a total of fourteen strikes and noted that it would allow more peremptories if they could show that any other prospective jurors were not qualified, fair or impartial (a direct contradiction to the philosophy of peremptory challenges discussed in the opinions of this Court cited above). *United States* v. *Kline*, 221 F. Supp. 776 (1963).

In the instant case, the Court below apparently deferred to the "sound discretion" of the trial court because the peremptories seemed to have been exercised informally (Ap., p. 11a).

The federal courts have done little or nothing to give recognizable, uniform shape to the equivocal Rule 24(b) when more than one man is charged by the sovereign. And no guidance has been given by this Court for establishing any uniform criteria to

insure that the individual members of a crowd are treated fairly at this stage of a trial.

If the right to peremptory challenges is as important as this Court has so often said it is and as important as all trial lawyers believe it to be, then it should be secured to every man who appears before the federal bench, whether he stands alone or in the midst of other accuseds.

C. The Method of Allotting Peremptory Challenges in the Instant Case Demonstrates the Need for Guidance From This Court to Secure in Reality the Right It has Stated to Be so Important.

As has been noted, in the selection of the trial jury below each defendant was allowed one peremptory challenge—a total of twenty-four strikes for "the defense." The government was given the right to exercise the six peremptory challenges called for by Rule 24(b) (Order of September 13, 1972). The trial court overruled petitioner's objections to this procedure.

Consider the offense charged: L. C. Cook and forty other persons (27 defendants and 13 co-conspirators), according to the grand jury, "combine[d], conspire[d] and agree[d] together and with each other . . ." to violate the law. If one is not guilty of such a charge then one is not a confederate (at least, within the bounds of the indictment) of his co-defendants. To treat him as such is tantamount to an assumption of his guilt. Defense to the charge of conspiracy neces-

sarily entails disavowal of common purpose with those with whom one is accused of having conspired.

The trial court, in awarding twenty-four peremptory challenges to, "the defense," necessarily assumed nothing less than congeniality among the multitude. But the Court had no right to rely upon that assumption. Petitioner vigorously notified the Court that he and his defense were unrelated to and in conflict with his co-defendants.

The result of this ruling was mainfestly unfair to L. C. Cook, *vis-a-vis* the government and most of his co-defendants. One of the other defense counsel represented eight of the defendants (whose interest, it must be presumed, were not in conflict). Thus, for one common interest eight strikes were allowed. Another counsel represented nine defendants—thus, he had nine peremptory challenges toward a single goal. Two other counsel each had two strikes (Tr. O, Week of April 2, 1973, p. 1). Petitioner, through his trial attorney, had but one.

In short, of the total of thirty peremptory challenges allowed to the parties, twenty-nine were from participants who were at cross-purposes with L. C. Cook. The allowance of only one peremptory strike under such circumstances denied to this petitioner any effective voice in choosing the jury which tried and convicted him.

Perhaps extending to each of several defendants the ten strikes which a lone accused would receive might excessively burden the economy of our judicial system; but, surely, to allow the accused the same num-

ber as the accuser would not be unfair. See *Hayes* v. *Missouri,* 120 U. S. 28, 70, 30 L. Ed. 578, 580, 7 S. Ct. 350 (1886).

The words of this Court in *Kotteakos* v. *United States,* 328 U. S. 750, 772 (1946) (Ap., pp. 4a-5a) have been oft cited; but the substance of them seems to have been lacking here:

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application."

II

THE COURT OF APPEALS HAS SANCTIONED DEFAULT BY THE DISTRICT COURT OF ITS OBLIGATION TO CONTROL BOTH THE MANNER OF INSTITUION OF CRIMINAL PROCEEDINGS AND CONDUCT OF TRIAL.

A more extended description of the trial setting in the instant case is required to apprise the Court of petitioner's complaint here. For the courts of Western Kentucky, the trial was a marathon event.

For eight consecutive weeks during the spring of 1973 twenty-four defendants, their seven attorneys, thirteen co-conspirators, two prosecutors and their supporting staff, the regular court reporter and two special court reporters, the U. S. Marshal and no less than forty deputy and special-deputy marshals, the clerk and his staff, the judge and his staff, twelve jurors and six alternates, an untold number of special agents of the F. B. I. and other law enforcement officers, and hundreds of witnesses (only a small number of whom

testified regarding more than one defendant) were attendants to a single trial, expending money of the United States in Bowling Green, Kentucky. (From the Trial Orders, published accounts in the local newspaper and statements of the prosecutor.)

For eight consecutive weeks, except on weekends, the eighteen jurors were sequestered.

Yet, it is readily apparent from a review of the record (as noted before) that petitioner could have been tried alone in a single day (with a single defense attorney, a single prosecutor, no special deputy marshals, no sequestered jury, no rented theaters).

In the setting of this joint trial, however, L. C. Cook had no control over the responses to the government's charges. Each of the seven defense attorneys involved had his own clients' interests to assert, his own manner and tactics of defense, his own witnesses, his own issues to draw out on cross-examination, notwithstanding the danger of injury to another's client.

Petitioner does not describe this discomfort, in and of itself, as a reversible error (just as speeding, alone, cannot be correctly cited as the cause of a traffic accident). But the situation, from the start, was dangerous.

The indictment was drawn and this trial setting created by the prosecutor, the Assistant United States Attorney in charge of the case (Not the United States Attorney—unless things have changed a great deal in the years since this writer has left that office).

Petitioner objected strenuously to his joinder (by the Assistant U. S. Attorney, through the grant jury)

with the twenty-six other persons charged. But the government was never called upon to justify the joinder. (It did respond, however, by citing rote-oriented cases referring to the "sound discretion" of the trial court.)

The sound discretion of the trial court was never exercised on this issue. Tht court, without comment or request for explanation from the government, simply overruled the objections to the joinder. No *in camera* inquiry or review of evidence, as provided for in Rule 14 of the Federal Rules of Criminal Procedure was made. That is, the district court deferred to the "sound discretion" of the Assistant U. S. Attorney.

The court of appeals deferred to the sound discretion of the district court.

Through such default, the district court allowed itself to become overburdened with this marathon.

Of the seven trial counsel and their twenty-four defendants several were "in and out" during the trial, attempting to tend to other business while witnesses they felt—or hoped—were irrelevant to their cases testified (From the Trial Orders, all 8 weeks). Confusion arose early and remained throughout the trial. One attorney's tactic was often another attorney's complaint. See, Ap., p. 12a. And some defendants asserted willingness to testify in behalf of others if only they were not in the same trial at the same time.

At one point, about three weeks into the trial a government witness, Barry Lynn Clayton, an unindicted, immune co-conspirator, testified that a co-defendant

of petitioner, Billy Mayes, had once told him (Clayton). that the petitioner had told Mayes that he (the petitioner) was willing to buy a stolen car from him (Mayes). This confusing hearsay upon hearsay was admitted over vehement objections. It constituted a major part of the evidence presented against petitioner (Tr. Vol. 18, pp. 2818-2820).

After the close of the government's case counsel for L. C. Cook proposed to call the co-defendant Billy Mayes as a witness in petitioner's behalf for the expressly limited purpose of presenting to the jury his denial of any knowledge of or acquaintanceship with L. C. Cook. This proposal, with the expressed limitation, was agreed to by counsel for Mayes; and all other defense counsel agreed. But the government objected to the proposed limitation, so the trial court rejected the proposal and sustained the government's objection (TE Vol. 47, pp. 6639-45).

Counsel for Cook entered into the record his "avowal" that if Mayes was allowed to testify he would state that he did not know and had never seen L. C. Cook prior to the trial (TE Vol. 47, pp. 6639-45).

The trial court later sustained the objection of the government to proffered testimony by petitioner himself that Mayes had admitted to him, during a recess that he had never seen him before, because such testimony by Cook would be hearsay (TE Vol. 48, p. 6796).

In *Douglas* v. *Alabama*, 380 U. S. 415, 13 L. Ed. 2d 934, 85 St. Ct. 1074 (1965), the state prosecutor called to the stand the co-defendant (who had been tried, but was appealing) of Douglas. The co-defendant declined

to testify on self-incrimination grounds. But the prosecutor, under the guise of cross-examination, read to the jury a purported confession of the co-defendant, implicating (accusing) Douglas. Douglas was unable to cross-examine the co-defendant because he continued to refuse to testify. Law enforcement officers later took the stand and affirmed that the co-defendant had made the confession read by the prosecutor. The Court found this procedure unacceptable.

In the instant case the witness Barry Clayton was willing to testify, just as the law enforcement officers in *Douglas,* but the co-defendant who supposedly made the accusatory statement, as in *Douglas,* was not.

Even within the setting of the trial below the district court could have obviated this complaint by simply overruling the objection of the government (TE Vol. 47, pp. 6643-44) to the limited scope of cross-examination of the co-defendant Mayes and allowing him to testify only to the singular assertion of Clayton.

But these fundamental rights could have been better afforded to this appellant without prejudice to the United States. The presence of L. C. Cook at the trial below added nothing (except, perhaps, confusion) to the government's case against any other defendant. The cost for the jury and the attendants to the Court would have been less. And only the co-conspirator witnesses would have been required to make an extra trip for Cook's trial, and they were "kept" by the government anyway (See TE Vol. 8, pp. 1398-1400).

The trial judge in the instant case was well known as a learned, experienced and fair-minded jurist. But

he allowed himself to become overburdened with too many rights to protect simultaneously.

The court of appeals kept petitioner's appeal under advisement for over a year; but the record was so extensive that petitioner must speculate that it became difficult to consider "minor errors" in this long and tiring trial reversible, even though they might have been if presented by a lone appellant or brought up from a trial of just a few defendants.

There comes a point in the institution of charges against numerous persons together when control of proceedings by the court is lost, due simply to the large number of participants.

Guidance from this Court is needed in establishing standards or presumptions for the keeping of order in judicial proceedings through avoidance of crowds—and to assure us that we will not be lost in crowds.

CONCLUSION

> The history of liberty has largely been the history of observance of procedural safeguards.
>
> Frankfurter, J., *McNabb* v. *United States,* 318 U. S. 332, 347 (1943).

To be observed, procedural safeguards need, first, to be established. Petitioner calls upon this Court to consider and to establish standards of procedure to deal more effectively and fairly with the increasing

number of trials involving increasing numbers of participants.

Respectfully submitted,

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